JUL 14 1945
CHARLES ELMORE CROPLEY
CLERK

No. 232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans

---

J. D. DODSON,
ELMORE H. BORCHERS,
TOM M. DAVIS,
J. M. BURFORD,
G. H. PENLAND,
R. S. SHAPARD
T. A. SLACK,
HARRY R. JONES,
Attorneys for Petitioners

Of Counsel:
BAKER, BOTTS, ANDREWS & WHARTON,
ANDREWS, KELLEY, KURTH & CAMPBELL

ALPHA LAW BRIEF CO., HOUSTON

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans

---

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

This is a suit by the United States for a declaratory judgment construing two freight rate circulars or tariffs promulgated by the Railroad Commission of Texas and to determine thereby the correct intrastate rate on sand, gravel, and related articles from all points in Texas to a station called Flour Bluff. All defendants in the District Court (petitioners here) were railroad corporations.

On August 1, 1940, the Texas Railroad Commission issued its circular providing for a special rate on the subject ma-

terials from all points in Texas to the station of Flour Bluff. This special rate was accomplished by providing in effect that thereafter on joint line hauls the single line rate (lower than the normal rate for joint line hauls) should apply.

The material portion of this tariff is in words as follows:

> "(a) On sand, gravel, crushed stone, crushed asphalt rock, asphalt coated sand, gravel, stone or rock and related articles, from all points of origin to Flour Bluff, standard single line scale based on short line distance shall apply."

Several months thereafter the Railroad Commission of Texas revised the general rates on the subject materials by lowering both the general joint line rates and the single line rates. No direct reference was made to the first circular or to any other special rate, but in its opinion, which was made a part of this second order, the Texas Railroad Commission said:

> "from the evidence offered existing special rates, *where lower than the prescribed rates*, should be continued."

Immediately following this statement and as a part of its circular the Commission further provided:

> "We further find that the evidence does not justify cancellation of any existing special rates, and that the said special rates should be retained, *the rates to be prescribed to be applied if lower*."

By its findings of fact and conclusions of law and by written opinion accompanying its decree, the trial court ruled in effect:

(1) that the case was a proper one for a declaratory judgment;

(2) that by its second order above referred to the Texas Railroad Commission intended the new general rates to be applicable in all instances except those where previously prescribed special rates were lower than the new general rates (R. 57, 58).

As a result of the foregoing findings, it followed (and the trial court held) that the new joint line rates to Flour Bluff would be applicable to joint line shipments of the subject materials because they were lower than the old special rates which resulted from the application of the single line rate to joint line hauls.

The United States appealed from the judgment of the District Court to the Circuit Court of Appeals for the Fifth Circuit, which latter court by its judgment of May 10, 1945, reversed the judgment of the District Court and held specifically that the first circular of the Texas Railroad Commission hereinabove mentioned required application to joint line hauls of the single line rates established by the later circular, which is to say that under the opinion of the Circuit Court of Appeals the new single line scale of rates is applicable to all joint line shipments of subject materials to the station of Flour Bluff. Having so held, the Circuit Court of Appeals further decreed that the cause be "remanded to the court below for further proceedings not inconsistent with this opinion." There can be no "further proceedings" other than the entry of judgment in the District Court in accordance with the Circuit Court of Appeals' decision.

Motion for rehearing was timely filed and was denied by order of June 15, 1945.

The jurisdiction of the District Court rested upon the fact that the suit was brought by the United States (Section 41 (1), Title 28, UNITED STATES CODE).

Jurisdiction of the Supreme Court to Review the Judgment of the Circuit Court of Appeals

This Court has jurisdiction to grant a writ of certiorari and to review this case under the provisions of Section 347 (a), Title 28, UNITED STATES CODE.

Question Presented

The sole question presented is whether the general *joint line* rates on the subject materials, which were promulgated by the Texas Railroad Commission by the second circular (No. 13321, R. 97-120), have been applicable to joint line shipments of the subject materials from all points in Texas to the station of Flour Bluff since the effective date of such circular; or whether, because of the provisions of the first circular (No. 13156, R. 93), the *single line* rates provided in the second circular have been, since the effective date of the second circular, applicable to joint line shipments. The secondary question, which is determinative of the basic question, is whether the first circular, which was admitted by the Circuit Court of Appeals to have created a *special rate* in a "sense," was, in fact, a *special rate* and within the provisions and meaning of the second circular, which specifically provided that previously existing special rates should apply only where lower than the new general rates.

Reasons Relied on for the Allowance of the Writ

The writ of certiorari should be granted in the exercise of the Supreme Court's discretion because the Circuit Court of Appeals has rendered its judgment upon a supposed and asserted set of facts which are not true and which were not taken from or even suggested by the record in the case.

We realize fully the infrequency with which writs of certiorari are granted for any reason similar to that which is here set forth, and we realize further that the first reaction of any reader of this petition must be one of incredulity at the assertions made. We respectfully submit, however, that where it can be conclusively demonstrated, as it can be here, that the Circuit Court of Appeals has by its own opinion asserted the basis of its judgment to be facts which by no stretch of the human imagination can be deduced from or found to be suggested in the record, then surely the party whose rights are affected by that judgment has not had a fair trial and the Circuit Court of Appeals, in the words of the rules of this Court, "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision."

May we respectfully emphasize the fact that this petition is not based upon any consideration of the *preponderance* of evidence or as to whether there might or might not be a *scintilla* of evidence to establish the facts asserted to be the basis of the opinion of the Circuit Court of Appeals. We would not suggest that this Court should grant a writ of certiorari for the purpose of *weighing* evidence or testimony. Our contention here is that the Circuit Court of Appeals has reversed the judgment of the District Court and has stated as the reasons for its conclusions a set of facts which *is wholly absent from the record.*

The record will show that the case was tried to the District Court without a jury. No witness testified in person, and the only evidence offered by anyone was contained in the depositions of two so-called "experts," who are employees of the Railroad Commission of Texas (R. 66 and R. 131). Attached to the depositions of these witnesses were certain freight rate circulars or tariffs or orders issued by the Railroad Commission of Texas and certain letters written to the Commission.

The two witnesses who testified by deposition did not purport to know anything of the circumstances leading up to the issuance of the circulars and did not purport to testify in regard thereto. These witnesses testified to their conclusions as to the proper construction of the freight circulars, and these conclusions were very properly excluded by the trial court as improper evidence (Sup. Tr. 1).

In its brief in the Circuit Court of Appeals, the United States through its attorney made numerous statements of fact which were not contained in the record and to support which no reference was made to the record. Petitioners (appellees there), in their brief, pointed out to the Circuit Court of Appeals such fact. The brief of the United States in the Circuit Court of Appeals, however, did not compare in its deviation from the record with the opinion which the Court itself handed down.

The opinion of the Circuit Court of Appeals is short. It contains certain statements of fact which are unquestionably the basis of its decision and which cannot be found in the record at all. We will quote from the opinion in italics and comment upon such quotations.

> "*To facilitate and expedite the project, the Government determined to construct and maintain a railroad track 19 miles long from Flour Bluff Junction* * * *." (Second paragraph of Court's opinion.)

There is no suggestion in the record that "the Government" constructed or maintained or had anything whatsoever to do with the nineteen miles of railroad track mentioned. The only mention in the record of the matter is in the letter (R. 136, p. 124) to the Railroad Commission from one H. N. Roberts, in which he stated:

> "The rail extension to be constructed by the contrac-

tors under memorandum of agreement reproduced in Exhibit No. 2, attached hereto and made a part hereof, will be operated by the Texas Mexican Railway (one of petitioners herein) under appropriate Certificate of Convenience and Necessity which is now being sought."

The Circuit Court of Appeals said:

> *"Negotiations with carriers operating in the territory were begun in order to reach an agreement with respect to rate advantages to which the Government might be entitled by reason of using its own trackage."* (Second paragraph of Court's opinion.)

There is nothing in the record to suggest this statement.

The Circuit Court of Appeals said:

> *"The Government, by virtue of its construction and maintenance of the 19-mile track, was not an average customer."* (Fifth paragraph of Court's opinion.)

This is a repetition of the substance of the Court's prior statement, but the fact is there is no word of testimony to support the statement or to suggest it.

The Circuit Court of Appeals said:

> *"The partial elimination of these elements of expense not only entitled the Government to cheaper freight rates, but also deprived the railroads of grounds for charging normal rates."* (Fifth paragraph of Court's opinion.)

Aside from the fact that the Court's statement in regard to the "elimination of elements of expense" is not suggested by the record, it is squarely opposed to the facts of the case, if they could but be known.

The Circuit Court of Appeals said:

> *"The Government's pending claim to a favorable rate differential was not based upon considerations of a passing, temporal nature, but upon a permanent and unchanging status."* (Sixth paragraph of Court's opinion.)

Not only was there no witness who testified to this fantastic statement, but there was no witness who purported to have the slightest knowledge of any condition prevailing with respect to the Government's business or its operations. There is no evidence that the Government had claim to a "rate differential," and there is not a syllable of testimony concerning any of the conditions at Flour Bluff except a statement that quantities of materials were to be hauled there.

In this case the District Judge, a man long known and recognized as a high authority on Texas law, rendered the judgment of the District Court upon the evidence before the Court and with a profound knowledge of Texas law. The Circuit Court of Appeals has reversed this judgment upon a supposed set of facts which do not exist. It has furthermore indulged in the supposition that the Railroad Commission of Texas had the power to grant a freight rate differential to the Government of the United States when the most casual examination of Texas law would unquestionably reveal the absence of a possibility of that.

All this would result in damage to the petitioners in excess of a quarter of a million dollars.

Endeavoring to comply with the spirit of the rules of this Court as we believe them to have been interpreted from time to time, we refrain from argument in this petition on the merits of the case. We submit that a reading of the opinion of the Circuit Court of Appeals in the light of the record will show conclusively that petitioners have not had a consideration of their case based upon the record made at the trial. If this be untrue, it should be refuted easily by the Government in reply hereto. If this be true, we respectfully

submit we are entitled to an adjudication of the case on the facts as they are, and since this may now be had only in the Supreme Court of the United States, this writ should be granted.

Respectfully submitted,

J. D. DODSON,
1822 Transit Tower,
San Antonio, Texas;

ELMORE H. BORCHERS,
First National Bank Bldg.,
Laredo, Texas;

TOM M. DAVIS,
Esperson Building,
Houston 2, Texas;

J. M. BURFORD,
Interurban Building,
Dallas, Texas;

G. H. PENLAND,
Katy Bldg.,
Dallas, Texas;

R. S. SHAPARD
T. & P. Bldg.,
Dallas, Texas;

T. A. SLACK,
Gulf Building,
Houston 2, Texas;

HARRY R. JONES,
Gulf Building,
Houston 2, Texas,
Attorneys for Petitioners

Of Counsel:
BAKER, BOTTS, ANDREWS & WHARTON,
ANDREWS, KELLEY, KURTH & CAMPBELL,
Houston 2, Texas

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	3
Argument	12
Conclusion	17

CITATIONS

Cases:

Atlantic Coast Line R. Co. v. *Atlantic Bridge Co.*, 57 F. 2d 654	12, 14
Meredith v. *Winterhaven*, 320 U. S. 228	16
President and Fellows of Harvard College, In Re, 149 F. 2d 69	16
United States v. *Gulf Refining Co.*, 268 U. S. 542	13

Statute:

Interstate Commerce Act, Sec. 22 (49 U. S. C. 22)	8

662936—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 232

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Southern District of Texas (R. 48–58) are not officially reported. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 140–143) is reported in 148 F. 2d 896.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 10, 1945 (R. 143). The petition for a writ of certiorari was filed on July 14,

1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

An intrastate rail tariff circular (No. 13156), issued pursuant to an agreement between Texas rail carriers and the United States, provided, *inter alia,* that sand, gravel, and related materials would move to a new Naval Air Base at "single line scale of rates based on short line distance." The computation of rates for specific movements under this formula involved a reference to the general Texas intrastate rail tariff (Consolidated Tariff No. 1) which contained mileage scales for various commodities, the single line scale being lower than the joint line scale which applied to movements over two or more independent railroads. The question presented is whether, upon the downward revision by order of the Texas Railroad Commission of the entire intrastate sand and gravel mileage scale shortly after the issuance of Circular No. 13156, the formula was to be interpreted as applicable solely to the mileage scales superseded by the downward revision order.[1]

[1] This was the question presented to and decided by the court below. It is also the substance of petitioners' statement of the "Question Presented" (Pet. 4). However, without specifying any errors, petitioners in their "Reasons Relied on for the Allowance of the Writ", fail to discuss this question and attack the decision below on the single ground that the opinion below was rested exclusively upon facts not in the record.

STATEMENT

Texas rail rate tariffs.—Consolidated Tariff No. 1, a loose-leaf tariff first promulgated by the Railroad Commission of Texas in 1932 (R. 50), embodies by addition and amendment all Texas intrastate rail rates (R. 69). The basic method of determining rates is provided by standard mileage scales (for commodities or classes of commodities) contained in this tariff (R. 70). Single line mileage rates apply to shipments which move over a single railroad; joint line mileage rates, higher than single line rates, apply to shipments which move over two or more railroads (R. 70). The rate on any particular shipment is calculated by applying the mileage from point of origin to point of destination to the appropriate mileage scale (R. 89). Upon the establishment of new stations, mileage scales are automatically applicable (R. 83). Standard mileage rates, however, do not apply to shipments for which group or specific rates[2] are carried in the tariff or in the

[2] Group rates require the application of the same rate from two or more points in an origin group or to a destination group (R. 69). A specific or special rate is a rate in cents per ton published to apply from a particular point of origin to a particular destination (R. 89). As noted by the Circuit Court of Appeals (R. 142), special rates are illustrated by Circular No. 13280 providing a specific rate in cents per hundred pounds from Corpus Christi to Flour Bluff via the Texas-Mexican line (R. 52–53).

presence of a provision requiring a particular application of a mileage rate (R. 89).[3]

Circular No. 13156.—The United States constructed a Naval Air Base near Corpus Christi, Texas (R. 9). Rail service was, of course, necessary both to the construction and maintenance of the Base and, since none existed to the site chosen (R. 123), the United States undertook to construct nineteen miles of trackage from the Base to a junction point on the line of the Texas-Mexican Railway (R. 19, 26, 33, 37, 43, 49, 63). The two stations thus established were Flour Bluff at the Air Base and Flour Bluff Junction at the connection point on the Texas-Mexican line (R. 49).

The line was completed and operations over it began on October 10, 1940 (R. 19). Earlier, in June and July, 1940, conferences were held between representatives of the United States and of the railroads (R. 16–17) to discuss satisfactory rail service and rates to Flour Bluff Junction while the above-mentioned trackage was under construction (R. 127) and to Flour Bluff upon its completion (R. 130). An agreement was reached whereby the carriers established a basis of rates for the Government lower than those otherwise applicable under existing general tariffs,

[3] It should be noted that Texas rail carriers publish tariffs which are presumed to correspond in every way to the official tariffs issued by the Railroad Commission (R. 86). Hence, the carriers' application here involved refers to their own rather than to the official tariff (R. 122).

and the carriers applied to the Texas Railroad Commission for authority to publish a freight circular embodying its terms (R. 122–125). The circular issued in final form was No. 13156, authorized without the usual notice or hearing (R. 67) by the Railroad Commission on August 13, 1940 (R. 53), to be effective, at the carriers' request, one day after publication by them (R. 54, 124).[4] As a ground for approval of the application, the carriers stated that a large volume of traffic would move immediately to Flour Bluff upon completion of the trackage and that a movement of materials and supplies, including materials to be used in constructing the trackage, would begin immediately to Flour Bluff Junction. They further stated that such traffic would move at the agreed commercial rates on uniform bills of lading, not on Government bills of lading, and without land-grant deductions. (R. 124.)

Under the rate agreement embodied in Circular No. 13156, group or specific commodity rates[5] to Corpus Christi were made applicable to Flour

[4] Prior to the completion of the Government's nineteen-mile trackage from Flour Bluff Junction to Flour Bluff, the agreed rates were applicable to Flour Bluff Junction alone under Circulars Nos. 13133 and 13141. The sand and gravel formula on shipment to Flour Bluff, in issue in this case, was employed in these earlier circulars as a maximum on shipments of these commodities to the Junction (R. 51, 127, 130). Circular No. 13156 was published to be effective on October 10, 1940, the date on which operations began on the Government's track to Flour Bluff (R. 19).

[5] See fn. 2, *supra*, p. 3.

Bluff and Flour Bluff Junction; mileage rates, applicable in the absence of group or specific rates, were applied on a Corpus Christi basis or by use of the distance to the two new stations, depending on the distance of the point of origin from Corpus Christi (R. 122–123). These two provisions of the circular covered rates on freight generally. As to sand and gravel, the agreement provided for the use of "standard single line scale based on short line distance" (R. 10, 53–54, 122–123). In describing the agreed scale of rates, lower than those otherwise applicable, the carriers' application to the Railroad Commission stated that the agreement constituted a basis "in keeping with rates usually established for the movement of materials for construction and maintenance of Government projects" (R. 124).

The formula in Circular No. 13156 for the determination of sand and gravel rates to Flour Bluff, in itself, provided no rates. Rates were to be computed by the application of the formula to the standard single line mileage scale on sand and gravel contained in Consolidated Tariff No. 1.

Circular No. 13321.—Long prior to the events described above in connection with rates to Flour Bluff, the Texas Railroad Commission had instituted an investigation of the entire intrastate sand and gravel mileage scales (Docket 3645–R). The need for the investigation derived from the high level of rates in effect on these commodities.

Commercial producers of sand, gravel, and related materials suffered from the competition of wayside pit production, and the volume of rail traffic in these commodities was decreasing by reason of increased truck hauling (R. 99–101, 103–106, 108). Extensive hearings before the Commission led to its promulgation on April 8, 1940, of an order containing many reductions in the intrastate sand and gravel mileage scale (R. 97, 98). The effective date of this order was postponed on petition of the railroads and certain producers, further hearings being held in May 1940 (R. 97, 98), at which time the record in the docket was closed (R. 81). At the May hearings, the producers supported further general downward revision of the mileage scales (R. 99–100, 103–106) and their contentions were adopted in the order, Circular No. 13321, which was issued by the Commission on December 5, 1940, to be effective December 30, 1940 (R. 117–120).

The railroads had opposed mileage scale reductions throughout the docket proceeding (R. 111) and contended that the mileage scale should remain unchanged, special rates being used to meet specific competitive needs (R. 99–100, 102–103). To some extent, such special rates had been established for commercial producers in the past (R. 99–100, 102–103). However, as mentioned above, the Commission found the arguments of the railroads unconvincing (R. 111–115) and issued Cir-

cular No. 13321 which completely revised mileage scales on sand and gravel downward. The mileage scales so prescribed superseded the preexisting mileage scale and replaced it in Consolidated Tariff No. 1 (R. 119–120). In its original order on April 8, 1940, the Commission had approved the continuance of existing special rates where such rates were lower than the mileage scale rates as reduced, a proviso which was adhered to in Circular No. 13321 (R. 117).

On sand and gravel shipments from Texas points to Flour Bluff between October 10, 1940 and December 30, 1940, the rail carriers charged the standard single line scale mileage rates in accordance with Circular No. 13156. On and after December 30, 1940, the carriers charged the new joint line mileage rates prescribed by Circular No. 13321 on such shipments (R. 11). The rates thus charged were lower than rates obtained by applying Circular No. 13156 to the superseded single line scale but higher than rates which would have resulted from applying its formula to the new single line scale. On all shipments here involved, the United States paid the freight charges (R. 10–11).[6]

---

[6] Since December 2, 1942, construction materials moving to Flour Bluff from Texas points have been moving at reduced rates (see Section 22 of the Interstate Commerce Act, 49 U. S. C. 22) under Government bills of lading (R. 15–16) instead of under uniform bills of lading at the commercial rates involved here (R. 124).

By an amended complaint filed on May 21, 1943 (R. 8–14), the United States sought a declaratory judgment as to the correct construction of Circular No. 13156. The Government contended that Circular No. 13156 remained in full force and effect on and after December 30, 1940, and that, accordingly, the United States was entitled to the single line mileage scale of sand and gravel rates prescribed by Circular No. 13321 (R. 10, 12–13). The complaint also sought a declaratory decree that the United States had paid freight overcharges on the shipments involved during the period which began on December 30, 1940 (R. 13).

Identical answers were filed by the various railroads (R. 14–45).[7] Their principal contention was that the formula in Circular No. 13156 had to be interpreted as applying solely to those mileage scales contained in Consolidated Tariff No. 1 on October 10, 1940, the publication date of the circular; that the single line rates so obtained were higher than joint line rates provided by the subsequent Circular No. 13321; that, accordingly, the application of the formula in Circular No. 13156 resulted in "special rates" higher than the joint line rates provided by Circular No. 13321 and, therefore, were not saved by the "special rates" proviso in the latter order (R. 22–23, 26–27). (See Pet. 4.)

[7] The railroads conceded the propriety of the declaratory judgment proceeding (R. 65) though challenging it initially in their answers (R. 15, 21).

On August 12, 1943, the depositions, on notice, were taken of two expert witnesses from the Rate Division of the Texas Railroad Commission (R. 45–46), C. R. McNamee, Director of that Division (R. 66), and A. J. Scrivner, Interstate Rate Expert in the same Division (R. 131).[8] A motion for summary judgment, filed by the United States on September 30, 1943 (R. 46–47), was denied by order dated May 5, 1944, on the ground that there had been a "hearing of the case on the merits" and that judgment would be entered in accordance with findings of fact and conclusions of law of the district court (R. 48). The "hearing" on the merits, held on October 25, 1943, consisted of statements by counsel for both sides and the offer of the depositions.

On May 5, 1944, the district court filed its findings of fact and conclusions of law (R. 49–58). It held Circular No. 13156 in full force and effect after December 30, 1940 (R. 57). However, the district court appears to have assumed that the formula contained in Circular No. 13156 applied solely to single line rates in effect between October 10 and December 30, 1940,[9] and held that

[8] The opinions of these witnesses as to the proper interpretation of Circulars Nos. 13156 and 13321 were apparently excluded by the District Judge (R. 137–138).

[9] The district court, by its unexplained reference in its fourth conclusion (R. 57) to single line rates in "Consolidated Tariff No. 1, etc.", apparently referred solely to rates therein at the time of publication of Circular No. 13156. The court failed to recognize that the revised mileage scale contained in Circular No. 13321 cancelled the preexisting mileage scale, and itself became part of Consolidated Tariff No. 1.

the rates so calculated were "special rates" within the meaning of Circular No. 13321 (R. 57). The court, therefore, held that, since such "special rates" were always higher than the joint line rates prescribed by Circular No. 13321, such "special rates" were not applicable on sand and gravel shipments to Flour Bluff on and after December 30, 1940 (R. 57–58). Judgment for the railroads was entered in the district court on May 31, 1944 (R. 58–60).

The Circuit Court of Appeals reversed the judgment of the district court on May 10, 1945 (R. 143). It held, as had the district court, that Circular No. 13156 remained in effect after December 30, 1940 (R. 141). It further held that Circular No. 13156 created a formula whereby rates could be computed by reference to current tariffs (R. 142). It rejected the restrictive contention of the railroads that the circular be interpreted to apply only to mileage scales in existence at the time of its issuance, holding that no such restrictive meaning appeared in the language employed in the circular and that such an interpretation was "patently unreasonable" in view of the circumstances of the case (R. 143). Accordingly, the court below held that on and after December 30, 1940, the proper sand and gravel rates on shipment to Flour Bluff should have been computed by applying the Circular No. 13156 formula to the standard single line scale provided by Circular No. 13321 (R. 143).

ARGUMENT

We submit that there is nothing in this case which warrants review by this Court.

1. The construction given the tariff circulars by the court below was reasonable and, we believe, clearly correct. Nothing in Circular No. 13321 abrogated or repealed Circular No. 13156, and, as held by both lower courts, the latter circular remained in effect after December 30, 1940. The language of Circular No. 13156 neither requires nor justifies the freezing of its formula to the general mileage scales in effect at the date of its publication. The holding of the court below, that rates are to be computed under the Circular No. 13156 formula by applying it to the mileage scale currently effective is, therefore, entirely consonant with the language employed in the circulars.[10] *Atlantic Coast Line R. Co.* v. *Atlantic Bridge Co.*, 57 F. 2d 654 (C. C. A. 5). By thus

[10] In considering the case, the court below properly discarded as question-begging the railroads' "special rate" argument which we have described above (see Statement, *supra*, p. 9) (Pet. 1, 2, 4). A special rate is one expressed in dollars or cents applying from specific point of origin to specific destination (R. 89). Moreover, the decision of the court below that the Circular No. 13156 formula applies to mileage scales effective at the time of its use on specific shipments rendered immaterial the question whether the rate so produced was a "special rate" within Circular No. 13321. In any event, such a rate, lower than the Circular No. 13321 joint line rate for which the railroads contend, would be the operative rate.

construing the specific and general circulars together (*United States* v. *Gulf Refining Co.*, 268 U. S. 542, 546), effect was given to both circulars and the inconsistency of the district court's decision was avoided.[11]

2. As a basis for seeking review, the railroads rely only on attacking certain of the circuit court of appeals' statements of "surrounding facts and circumstances" as not grounded in the record (Pet. 6–8), and contend that such statements furnished the sole basis of decision (Pet. 4–5). As shown herein, these statements were actually supported by the record.

The court below found two factual situations persuasive of the reasonableness of the tariff construction urged by the United States (R. 142, 143): (1) the status of the United States as shipper; (2) the relationship, particularly in time, between the circumstances of issuance of the two circulars.

As to the second situation, the railroads unquestionably knew at the time of the Flour Bluff agreement that reduced sand and gravel mileage scales had already been ordered by the Railroad

[11] Although holding Circular No. 13156 in effect after the issuance of Circular No. 13321, the restrictive application allowed the former circular by the district court yielded rates higher than those assessed by the railroads under Circular No. 13321. This, in substance, was a holding that Circular No. 13156 was no longer effective after December 30, 1940, and had been repealed *sub silentio* by Circular No. 13321.

Commission after long investigation and extensive hearings, and that the effective date of the order had merely been postponed to consider further downward revision. Nevertheless, the railroads, in drafting the sand and gravel formula in Circular No. 13156, included no apt words of limitation which would support the view urged by them herein.[12] The petition is silent with regard to the use by the court below of the Circular No. 13321 proceeding as an aid to construction (R. 142–143), nor does it assert that this situation in itself does not furnish sufficient evidence as to the Railroad Commission's intent in issuing the two circulars.

The petition does attack various statements of fact adverted to by the court below in recognizing the Government's status as preferred shipper (Pet. 6–8). The favored position of the Government as shipper was the very basis urged by the carriers in their application for approval of Circular No. 13156. As noted above (pp. 5, 6, *supra*), the carriers therein recognized the volume of traffic which would move to Flour Bluff and Flour Bluff Junction, the Government's power with respect to Government bills of lading and

[12] These facts support the judgment below as conforming to the rule that railroad-written tariffs be construed in a manner favorable to the shipper, if the tariff language be considered ambiguous. *Atlantic Coast Line R. Co.* v. *Atlantic Bridge Co.*, 57 F. 2d 654, 655 (C. C. A. 5).

land-grant deductions, and stated that the favorable scale of rates proposed by their application was in accordance with "rates usually established for the movement of materials for the construction and maintenance of Government projects."

Disregarding the fact of the Government's favored position, the petition challenges certain facts and inferences from the record relied upon by the court below in support of the ultimate finding, asserting that such facts and inferences are not supported by the record. The principal grievance appears to be a statement made by the court below that the United States constructed the trackage from Flour Bluff to Flour Bluff Junction (Pet. 6–7). Admissions in the answers and concessions in court by petitioners' counsel amply support the statement (R. 19, 26, 33, 37, 43, 49, 63).[13] The petition further challenges, without specification of error, the court's ultimate finding that the Government's claim to a favorable rate differential was based upon a permanent status and, accordingly, continued under the lower mile-

[13] The court below said: "The Government, by virtue of its construction and maintenance of the 19-mile track, was not an average customer" (R. 142). Some question may exist as to who is chargeable with the ultimate maintenance of the trackage from Flour Bluff Junction to Flour Bluff. However, it is difficult to see how this statement reasonably, even if mistakenly, inferred by the court below, could furnish any ground for a successful attack on its judgment in the light of all the circumstances of the case.

age scales prescribed by Circular No. 13321. Clearly the circumstances of the case fully justify the recognition given by the court below to the permanent nature of the situation which gave rise to and justified the establishment of a rate differential by agreement. Further, these circumstances justify the rejection by the court below of the restrictive and technical attempt of the railroads to withdraw, after one month and 20 days, the sand and gravel rate formula which they had agreed to give the Government at a time when they had full knowledge of the downward revision of the intrastate sand and gravel mileage scales.

3. The question presented and decided below was purely one of local law properly cognizable in a federal court. *Meredith* v. *Winter Haven,* 320 U. S. 228.[14] The decision of the court below, if undisturbed, will be *res judicata* (*In Re President and Fellows of Harvard College,* 149 F. 2d 69 (C. C. A. 1)) and no question of a recurring nature is involved since construction materials have moved from Texas points to Flour Bluff at reduced rates on Government bills of lading since 1942.[15] In short, nothing herein warrants the exercise of this Court's supervisory powers.

---

[14] The propriety of federal jurisdiction herein is emphasized by the fact that the United States can unquestionably resort to its own tribunals and is immune from suit in any state tribunal.

[15] See fn. 6, *supra*, p. 8.

CONCLUSION

The decision below is correct, no question of importance is presented, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
JOHN F. SONNETT,
Acting Head, Claims Division.
PAUL A. SWEENEY,
SAMUEL D. SLADE,
WALTER J. CUMMINGS, Jr.,
Attorneys.

AUGUST 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945